Testimony of

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before the

United States Senate

Committee on
Health, Education, Labor and Pensions

Thursday, June 22, 2006

"Medical Justice: Making the System Work Better for Patients and Doctors"

A

Introduction:

I want to thank you, Chairman Enzi, ranking member Senator Kennedy and members of this committee, especially Senator Clinton, for the opportunity to appear today. I am the Chief Risk Officer for the University of Michigan and in that capacity, I have responsibility for overseeing the manner in which the University of Michigan responds to patient injuries, patient complaints and patient claims.

I came to the University in July, 2001 as Assistant General Counsel after 22 years of trial work, defending doctors, hospitals and other health care providers in Michigan and Ohio. In private practice, I represented a wide variety of care givers, from individual physicians to large group practices, from small inner city, minority-owned hospitals to a chain of osteopathic community hospitals to large academic medical centers like the University of Michigan and the Cleveland Clinic Foundation. I left trial practice and the law firm I founded because I believed the University could improve the way it handled patients' complaints, claims and litigation.

In twenty two years of practice, not a single client ever asked me what they could learn from the cases I handled for them. Driven by that realization, I was convinced that the University could not only save money in the short run through smarter claims management, but reduce future patient claims by learning from our patients' complaints. I could not have imagined that our experience would garner the national and even international attention it has, and I certainly never envisioned our work would lead to an opportunity to appear before a committee of the United States Senate. Thank you.

I am not a scholar. I have not had much time to research and read what has been written on the issues this committee has undertaken to study. My opinions arise from my experiences representing doctors and hospitals in malpractice cases, my experiences with the University of Michigan's program and frankly, from common sense. I am not an advocate for a particular interest group or point of view – indeed, some of my views elicit vigorous disagreement from UM doctors. I am well aware that my opinions do not sit entirely well with either end in this discussion and there are those in the medical and insurance communities who view some of my opinions as treasonous. My trial lawyer's instincts strongly suggest that if my views please neither side entirely, we very well may be on the right track.

What started as a focused effort to reduce claims costs at the UM has evolved to reveal the roles that inadequate commitment to patient safety and unmindful patient communication play in the stubborn problem which has plagued the medical community for decades. I appear today, not to "win" a fight, but to help fix this problem.

Identification of the problem:

This Committee's interest is identification of new ideas to make the system, (presumably the litigation system) work better for patients and physicians. I suggest that clarification of the problem is a necessary first step. I am convinced that the problem stubbornly persists despite past attempts to address it in large part because the treatment to date has targeted the wrong diagnosis.

Few involved in the medical malpractice arena would argue with Professor Sage's assessment in his March, 2005 DePaul Law Review Journal article:

"For over a century, American physicians have regarded malpractice suits as unjustified affronts to medical professionalism, and have directed their ire at plaintiffs' lawyers . . . and the legal system in which they operate."[1]

We ask a lot of our doctors, nurses and other health care providers. They are by nature, an unbelievably committed group, driven mostly by a strong sense of personal reward derived from helping sick people. Yet, they spend every working day in an inherently dangerous environment, a world in which the simplest decision, like prescribing antibiotics for a child's first ear infection, can have devastating consequences. We clearly need to better understand the trauma to the caregiver when such a catastrophe occurs, but it should come as no surprise that physicians reflexively blame the messenger when a patient asserts a claim.

Understandable human emotions may feed the "deny and defend" response to patient's complaints, but few believe the strategy has been effective. More importantly, that strategy has exacted a heavy cost. Simplistically blaming the legal system and plaintiffs' lawyers for patient complaints has stunted earnest efforts to improve patient safety and skirted recognition that many complaints could have been avoided by more thoughtful patient communication. Improving patient safety and patient communication honestly and openly is treatment more likely to cure the malpractice crisis than defensiveness and denial.

The University of Michigan's approach is effective in my opinion, because we have focused our efforts more accurately on the primary causes for most patient litigation: a failure to be accountable when warranted and a reluctance to communicate. Isolating the factors that comprise our approach can inform a broader debate on "making the system work better for patients and doctors."

Background:

The State of Michigan's last tort reforms took effect in April, 1994. (See attached) Among other provisions, those statutes,

- Created a compulsory six month pre suit notice requirement;
- Created a two-tiered cap on non-economic recovery, a lower general cap and an upper cap applicable to central nervous system injuries and injuries to reproductive organs rendering the patient incapable of procreation;
- Tightened qualifications necessary for experts testifying;
- Required an affidavit of merit by qualified experts to support any Complaint and Answer to Complaint filed.

The reforms had little effect on the UM's claims experience and almost no impact on the way in which the University responded to claims. Our claims rose, modestly but steadily from 1994 to 2001 and our costs rose with them. Pro activity was a fairly foreign concept and I was aware of no hospital or insurance company in Southeastern Michigan that systematically utilized the pre suit notice period to resolve claims or even, for that matter, prepare for litigation. The University, for the most part, still responded in the traditional "deny and defend" mode. Coupled with a distinct aversion to the risk of trial, the combined strategy, typical for mainstream medicine even

[1] Sage, William, Medical Malpractice Insurance and the Emperor's Clothes 54 DePaul Law Review 463, 464 (24 March 2005)

today, virtually guaranteed that resolution of patients' disputes would take a long time and would cost a lot, financially and otherwise. Like all of my other clients at the time, the University had not systematic way to learn from its claims.

In August, 2001, the UMHS had 262 open claims, varying from pre suit notices to active litigation. Actuaries valued the portfolio for reserves at more than $70 million. For an institution of our size and complexity, ours was actually an enviable record. Though no public disclosures exist to my knowledge, other institutions of similar size in our area reportedly had two and three times as many claims.

University of Michigan Claims Experience Since 2001:

Claims numbers fluctuate as existing cases are settled or dropped and new cases arrive. But using the month of August as a benchmark, the UMHS's claims numbers have dropped steadily despite a considerable increase in clinical activity over the same period.

- In August, 2001, we had 262 total claims;
- In August, 2002, we had 220;
- In August, 2003, we had 193;
- In August, 2004, we had 155;
- In August, 2005, we had 114;
- Since August, 2005, we have dropped below a hundred.

Our average claims processing time dropped from 20.3 months to 9.5. Total reserves on medical malpractice claims dropped by more than two thirds. Average litigation costs have been more than halved.

Our approach may have achieved the unthinkable: it pleases doctors *and* trial lawyers. Surveys conducted in early 2006 of our medical faculty and the plaintiff's bar in southeastern Michigan yielded approval from both sides. In our physician survey, more than 400 UMHS faculty physicians responded, and:

- 87% said that the threat of litigation adversely impacted the satisfaction they derived from the practice of medicine;
- 98% perceived a difference in the University of Michigan's approach to malpractice claims after 2001;
- 98% fully approved of the approach;
- 55% said that the approach was a "significant factor" in their decision to stay at the University of Michigan;
- The only consistent criticism was that they wanted more attention from Risk Management to assist them in reducing the threat of malpractice.

At the same time, we surveyed members of the plaintiff's bar in Southeastern Michigan, all specializing in medical malpractice:

- 100% rated the University of Michigan "the best" and "among the best" health systems for transparency;

- 90% recognized a change in the University of Michigan Health Systems approach since 2001;
- 81% said that they had changed their approach to our Health System in response;
- 81% said their costs were lower;
- 71% admitted that when they settled cases with the University of Michigan, the settlement amount was less than anticipated;
- 86% agreed that the University of Michigan's transparency allowed them to make better decisions about the claims they chose to pursue, and
- 57% admitted that they declined to pursue cases after 2001 they believe they would have pursued before the changes were employed.

University of Michigan Health System Changes Between 2001 and 2005:

A principled approach

Initially, a simple set of principles, (in my opinion, inarguable), were constructed and we began to make claims decisions immediately in the context of that framework:

1. We will compensate quickly and fairly when inappropriate medical care causes injury.

2. We will defend medically appropriate care vigorously.

3. We will reduce patient injuries (and therefore claims) by learning from mistakes.

These principles were publicized to our staff, our trial attorneys, the courts and directly and personally to plaintiffs' lawyers in Southeastern Michigan. Adherence to these principles created consistency in our response to claims and began to build confidence among our staff.

Distinguishing reasonable from unreasonable medical care

Commitment to these principles was, and remains essential to every other aspect of our approach. Key to honoring these principles is understanding the difference between reasonable and unreasonable care and an infrastructure and system for hard claims analysis was constructed to utilize whatever pre suit period we would have to arrive at the pivotal determination.

The benefits of transparency

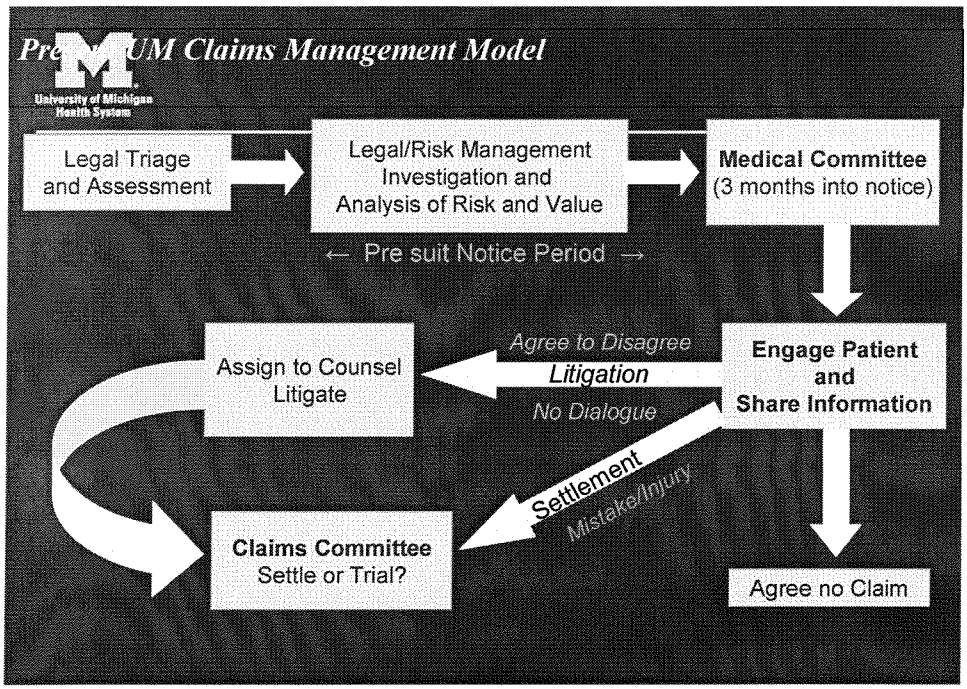
Flowing directly from this commitment is transparency. Decades of lawyers' admonitions not to talk about claims until the cases were resolved disappeared when we committed to acting in accordance with our conclusions about the reasonableness of our care. Concerns for compromising litigation virtually disappeared – if we concluded that our care was unreasonable and harmed a patient, we would be moving to resolve the claim. If we concluded that our care was reasonable, did it really matter if those conversations were revealed through discovery?

It became immediately apparent that our interests and the patient's interests at that point were exactly the same: as both faced the prospect of litigation, neither side wanted to make a

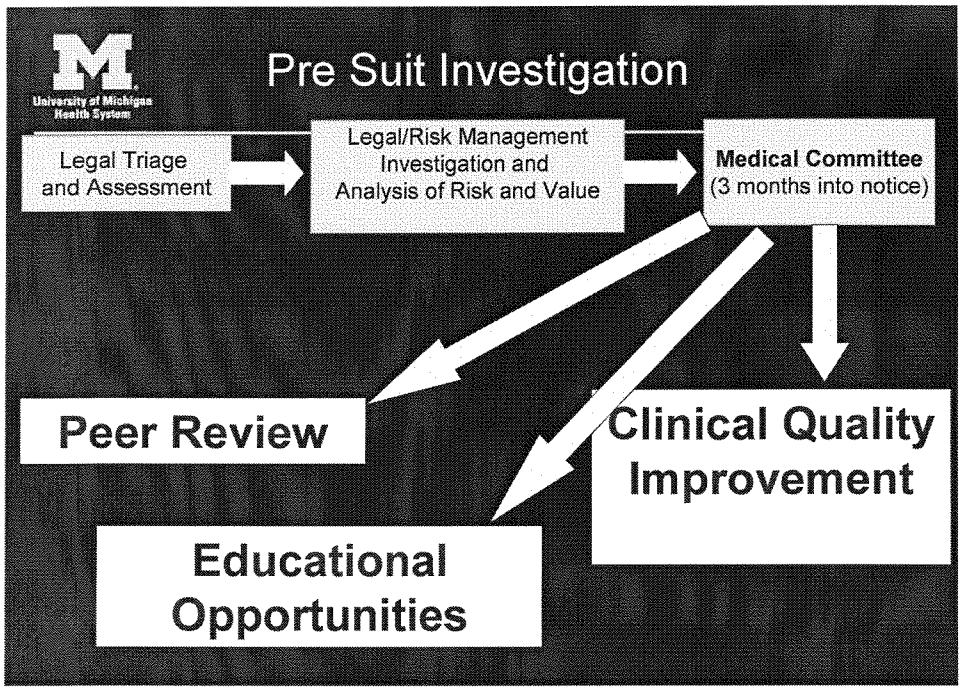
mistake. We did not want to defend a claim for years only to decide the claim warranted settlement and the patient and his lawyer obviously do not want to engage in expensive, time consuming and emotionally draining litigation only to lose the case. Discovery eventually leads to full disclosure anyway; so why not simply share our conclusions early and inexpensively? If our conclusions prove to be wrong, we want to know that before litigating. We discovered that nearly every plaintiff's lawyer came to the same conclusion.

Our process then lead to open dialogue with our patient and if represented, the patient's lawyer. Open, honest, and robust, discussions occur between patients and their doctors, doctors and the lawyers threatening to sue them. Expert opinions are exchanged and agreements are reached: sometimes agreements to drop the claim, sometimes to settle, sometimes to apologize and occasionally, to disagree. Constructive engagement allows the parties to mutually understand what they are facing with litigation and both sides can move forward with "informed consent". In the dynamic created, the decision to litigate becomes a mutual one and litigation is relegated more and more frequently to the role it was meant to play: a last resort for resolving intransigent disputes.

Claims at the UM follow this flow:



Commitment to these principles opens the door to immediate and decisive quality improvement measures and peer review opportunities. We are routing our patient's complaints, even those deemed without substance, through a process that asks in every single instance: Could we have done better? What improvements could be undertaken to avoid these kinds of complaints in the future? Why did this patient complain and how can we avoid the same thing happening again? Are there lessons to be learned? And we are not waiting until the claim is resolved.



Commitment to these principles stimulates a more robust communication between our doctors and patients at the point of care and complication. Our staff, essentially "finally granted permission by the lawyers" as one of our doctors characterized it, to speak openly is also principle-based and I believe this openness, intelligently and sensitively accomplished, will prove to be effective at intercepting patients before they feel the need to see a lawyer.

Despite widespread convictions that patients see lawyers because they are looking for a financial windfall, studies done to understand why some patients hire lawyers all yield the same results: patients are actually seeking accountability, answers and assurances that the same complication will not befall anyone else. My own experience cross-examining probably thousands of witnesses and litigants confirms the studies' findings. Rather than demonizing lawyers and the legal system, physicians need to ask a more difficult question: "Why would my patient feel the need for an advocate?"

None of these changes could have been implemented or accomplished without strong and committed leadership and robust participation by our physicians, nurses and other health care providers. Openly acknowledging that patient safety is at the heart of many patient complaints, our Chief of Staff, Skip Campbell, MD has undertaken bold initiatives in system-wide peer review and patient safety improvement with the avowed goal of becoming the "safest hospital in the United States".[2] The UMHS's chief executive officer, Doug Strong, recently observed at a board meeting that though we may be realizing significant savings through more prudent claims management, real savings lies in improving patient safety and that would be a driving force in the future.

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[2] Anstett, Patricia, ***U-M Hospital's Goal: Safest in the Nation*** The Detroit Free Press, February 24, 2004

What began as a set of strategies to save costs of litigation has evolved dramatically in a different direction: by focusing on patient safety and improved communication, we are now confident that medical malpractice will be relegated to background noise.

Lessons from the UM Experience:

A. Health care professionals work in an inherently and unpredictably dangerous environment in which the simplest decision can have catastrophic consequences for their patients. Medical care cannot be judged simply on outcome. The system must do a better job of ensuring that the distinction between reasonable and unreasonable care is made with clarity and based on sound medical and scientific knowledge. All too often, these conclusions turn on an expert's "performance" in the courtroom and not on scientific and medical substance. The failure of our system to ensure this is a major contributor to physicians' belief that the system does not provide justice for them.

B. Scientific uncertainty, junk science and testimony from outright charlatans must be filtered out. This may mean a role for "medical courts", but there exist in probably every jurisdiction in the country tools for courts to ensure claims are not based on shaky scientific and medical grounds. Evidentiary hearings, court-appointed masters, bifurcation of trials are all currently available to trial courts and though employed in other fields like real property litigation, are almost never used in medical malpractice suits. (Interestingly, the medical specialties have also failed to address this problem, though there are budding efforts underway to censure specialty board members that render clearly dishonest and unsupported testimony in Neurosurgery and Ob/Gyn.) At a minimum, judges must accept their role as gatekeeper of the evidence and robustly screen complicated expert opinions before allowing them to go the jury.

C. An inconsistency continues to plagued trial practice in this specialty: historically, opinion testimony deemed an infringement on the province of the jury and witnesses were restricted to factual testimony. As issues became increasingly complex, rules of evidence relaxed and expert opinion testimony was allowed where the court deemed the issues outside the experience of the average juror. We select juries by disqualifying those with knowledge of the subject matter, then expect these people to recognize which expert is lying and which one is accurate. With physicians' careers and millions at stake, the "battle of the experts" all too often becomes a beauty pageant.

D. We submit these complicated issues to the very people the court has acknowledged cannot understand them and still expect doctors to feel that they are being judged by a jury of their peers.

E. All parties to the issue are benefited by a healthy insurance industry. No patient's lawyer wants to find out that the doctor involved is un- or under-insured. Hospitals for years have served as excess carrier to physicians with too little insurance protection. Like it or not, the insurance industry requires some measure of loss predictability in order to remain financially healthy and in order to attract companies to offer this coverage. There are measures which can be taken to assist in this regard:

a. Caps on non-economic recovery. Caps on non economic recovery (elements of damage not subject to calculation) are one way to blunt the wide swings. They are by definition arbitrary and will pose a hardship on some injured patients, but may be a necessary evil. Though remedies to runaway verdicts like remititur and new trials also are available to trial courts, those remedies are rarely used, are not reliable nor predictable.
b. Catastrophic injury insurance plans. There is no reason states could not pull together catastrophic injury insurance plans which would provide catastrophic injury protection over a base primary insurance policy. The physicians could subscribe for very attractive premium costs, the lower risk physicians would subsidize the higher risk specialists if constructed properly. Participation would be conditioned on the physician's agreement to peer review, quality audits and other requirements.
c. Punitive Damages. In my opinion, there is simply no place for punitive damages. Invariably, the anomalous case reports arise in states with punitive damages. The existence of this form of recovery invites lawyers to speculate on high value – low liability cases. Adequate measures exist to punish physicians who deserve punishment.

F. Honesty and transparency are much easier to achieve if caregivers do not believe they are risking their financial lives or their insurance coverage by talking to their patients. Catastrophic injury protection is one way to address this problem.

G. Litigation was never meant to be the first resort for resolving disputes. Reform must offer the opportunity, incentive or if necessary, impose a requirement that the parties talk to each other before resorting to litigation as a means for resolving disputes. The Michigan scheme offered the opportunity and it is now increasingly used, but for the first ten years few insurance carriers or hospital systems availed themselves of that opportunity. Perhaps more than any other feature to the UM's approach, we have found that the free and credible exchange of information is responsible for the UM's success. All parties deserve to know that every opportunity to resolve the misunderstanding, dispute, or claim has been made before litigation is invoked.

H. Alternatives loosely characterized as "no fault" systems will not work. The medical and insurance communities will not be fairly served by creating an entitlement not based on the reasonableness of care. Physicians championing these alternatives and anxious to eliminate confrontation will not feel that justice has been served if a check is written on their account every time a patient's is less-than-optimal. And the theoretical underpinning of these proposals is inherently flawed: whether you seek to determine if the outcome resulted from negligence, or preventable, or avoidable error, the net effect from a litigation perspective is the same. All require expert testimony, discovery and the rest and the legal costs allegedly saved by these proposals are lost in the determination.

I. "Deny and defend" is the enemy of transparency. Mainstream medicine must turn its attention to its own complicity in this problem and stop blaming trial lawyers or the system for the crisis. All of the evidence suggests that changes in our approach to

patients may alleviate this problem, yet as long as Medicine is in denial, those changes will not occur. Hospitals and doctors must confront the ways their own behavior actually drives patients to feel the need for an advocate to deal with them. This problem cannot be fixed without active participation and leadership from physicians.

J. Gaps in the social safety net drive some litigation. Families faced with the results of catastrophic outcomes sometimes are driven to consider litigation as a means of financial survival. This driver needs to be addressed.

K. Focusing on patient safety and patient communication rather than whether or not to discard our legal system is absolutely essential. The best way to deal with the medical malpractice crisis is to turn our attention in those directions which requires bold and focused leadership from physicians and nurses.

L. As long as this issue is treated as a battle to be won or lost, it will not be fixed. The polemics must be set aside in recognition of the fact that we are all in this together, that persistence of this problem continues to cost every American money and more. Radical proposals like scrapping our tort system must give way to detailed, focused efforts designed to reach the real problems. I applaud the work of this Committee and specifically, the efforts of Senators Enzi, Baucus, Clinton and Obama in this regard.

University of Michigan Health System

UMHS Newsroom

Medical Malpractice and Patient Safety at UMHS

Since 2004, the U-M Health System has been in the national spotlight for its innovative approach to medical errors, mishaps and near-misses -- and their potential legal consequences including malpractice suits.

If you have reached this page after hearing or reading about our approach in the news media, welcome! We hope this page will be useful to you.

A summary of the UMHS approach to medical errors and malpractice claims is available.

We have also compiled links to many resources related to this issue, including testimony and articles, below.

It's important to note that our approach to medical malpractice claims is closely linked with our innovative approach to patient safety. For more on that, see our Quality and Safety Web site.

Reporters interested in learning more about our programs or interviewing Chief Risk Officer Rick Boothman, J.D., and Chief of Medical Affairs Darrell Campbell, M.D., may contact Kara Gavin, UMHS Public Relations, at 734-764-2220.

Online resources:

"Medical Justice: Making the System Work Better for Patients and Doctors (PDF)" - Testimony of Rick Boothman before the U.S. Senate Committee on Health, Education, Labor and Pensions, June 22, 2006

"Making Patient Safety the Centerpiece of Medical Liability Reform" - New England Journal of Medicine Perspective article by Senators Hillary Rodham Clinton and Barack Obama (Volume 354 Number 21 :2205-2208) May 25, 2006. Audio interview related to NEJM article, featuring Rick Boothman

Transparency: The Benefits of an Open and Honest Dialogue (PPT)
Powerpoint presentation given by Rick Boothman to the Health Law Division of the State Bar of Michigan, April 26, 2006 (11.1 MB download)

Articles and news items on our approach:

Doctors learn healing qualities of an apology
National Post of Canada
August 5, 2008

Doctors Say 'I'm Sorry' Before 'See You in Court'
New York Times
May 18, 2008

Practice of Hospital Apologies Is Gaining Ground
National Public Radio, All Things Considered
Oct. 6, 2007

Doctors try a new word: Sorry
Fuller disclosure of errors is changing the culture of secrecy in medicine. Chicago Tribune, Sept. 2007
Available online via the Orange County Register

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Doctors Learn to Say 'I'm Sorry', Informed Patient Column, Wall Street Journal, Jan. 24, 2007(Available online to subscribers only)

Curing the Malpractice Crisis by RIck Boothman, Guest opinion - Surgery News, page 12, August 2006

The Medical Malpractice Myth, by Ezra Klein - The Slate, July 11, 2006

Column by Rick Boothman and Dr. Steve Kraman, former chief of staff, Lexington, Ky. Veterans Affairs medical center (posted on the SorryWorks! Coalition Web site)

Apologies and a Strong Defense at the University of Michigan Health System
The Physician Executive March/April 2006 edition (see page 2 of the PDF)

Saying 'I'm Sorry' Is Starting to Pay Off with Reduced Lawsuits and Legal Costs
Healthcare Risk Management, October 2005

National Public Radio interview with Rick Boothman – December 2004

Copies of other news articles are available upon request from Kara Gavin, UMHS Public Relations, 734-764-2220.

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The U-M Health System approach to malpractice claims

Word is getting around that there's something different going on at the University of Michigan Health System when it comes to patient safety, medical mishaps and medical malpractice litigation.

You may have heard something about our policy of "saying sorry", or apologizing and having an open discussion, when clinical care does not go as planned. And while apologies are certainly part of our approach, there's much more to it than that. Communication, full disclosure, and learning from our experiences are all vital.

You may have also heard that we have steadily reduced the number of malpractice claims pending against us and our doctors, slashed our malpractice expenses, dramatically dropped the amount paid to plaintiffs as a result of judgments or settlements, and cut the time it takes to handle a claim. All of this is true.

In short, we're trying to "do the right thing" for our patients, our medical staff, and the public interest. We believe that court should be the last resort, not the first, when a medical mishap, complication or near-miss occurs.

This page will help you understand our approach, and what we have achieved in the years since we began using it. **We don't claim to have all the answers.** But we hope this information will be useful to other health care institutions, as well as the news media, as we all grapple with medical errors and the current malpractice climate.

First, some important background information:

1. **UMHS has committed itself to being one of the safest medical centers in America**, and to a constant search for new ways to prevent errors, infections, patient and staff injuries, and near-misses. And when a mishap or near-miss occurs, we're committed to confronting its causes in a blame-free way, and learning from it so that it doesn't happen again. Visit this page to learn about some of the things we're doing and what we've achieved so far.
2. **We're fortunate to be located in Michigan**, a state that passed sensible medical malpractice reform in the 1990s and is not having some of the same crisis situations as other states. Our state law, among other things, builds a six-month "cooling off" period into the malpractice lawsuit process. If a patient is thinking about bringing suit against a doctor or hospital for medical malpractice, the patient must first alert prospective defendants of their complaints with a "notice of intent," and both parties then have six months to consider their cases before going to court. UMHS systematically uses that period to investigate complaints and establish a dialogue with our patients, and their attorneys if they are represented, which often eliminates their need to resort to litigation.
3. **We're self-insured for malpractice insurance**. All of the U-M physicians who treat patients at the U-M

Hospitals & Health Centers are also faculty of our Medical School, and part of our Faculty Group Practice. The U-M General Counsel manages all claims against our medical staff, through staff and outside attorneys.

4. **We have excellent faculty and staff who provide some of the most complex, advanced medical care in the United States**, from transplants of bone marrow and organs, to complex cancer regimens, to open-heart surgery on newborn babies. As a result, our patient population on the whole has more serious and more complex medical issues than the populations at other hospitals. And we're attracting more patients than ever. This combination of factors means that we walk a high tightrope of risk every day. While independent measures show that our care is world-class, we face the reality that complications can happen despite our best efforts, that procedures and treatments carry risks, and that we must always search for ways to control factors that can affect our patients' outcomes.

So, what do we do when something happens that shouldn't have? How exactly do we handle malpractice suits? And what results have this novel approach yielded?

Our approach can be summarized as:
"Apologize and learn when we're wrong, explain and vigorously defend when we're right, and view court as a last resort."

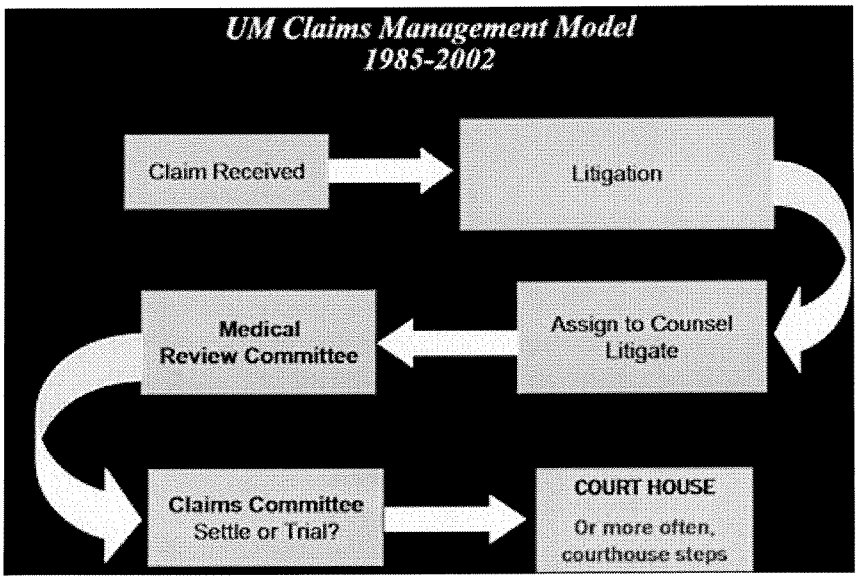
We care deeply about our patients, and we take it very seriously when one of them is injured, concerned or unhappy about the care we have provided. We also care deeply about our staff, and we want to support and protect them so they can continue to do great work. And, we want to create as safe an environment as possible for both patients and staff.

So, when a patient complains, or a staff person realizes that a mishap or near miss has occurred, several things happen:

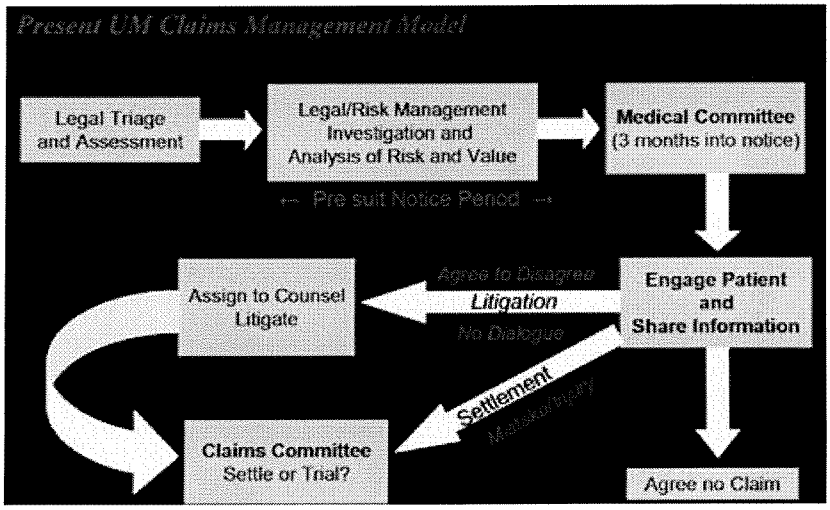
1. We follow our institutional policy of communicating openly and directly with the patient or his/her medical representative in the aftermath of the situation or complaint.
2. We review the incident or complaint thoroughly and impartially, to assess what happened. This includes a peer review involving professionals in relevant fields. We also note any opportunities for improvement that might prevent similar situations in the future.
3. If the patient has engaged legal counsel, we offer to meet with both of them to review the care and answer their questions, whether or not they have sent us a notice of intent to sue.
4. If we have concluded that our care was unreasonable, we say so – and we apologize. If our care caused an injury, we work with the patient and his/her counsel to reach mutual agreement about a resolution. This doesn't always mean a settlement, but if it does, we compensate quickly and fairly.
5. If our investigation convinces us that the care was medically appropriate, we still offer to meet with the patient and his/her counsel to discuss our findings. Often, a medical staff member involved in the patient's care will participate in this discussion. Many patients are satisfied with full explanations, and may even drop their complaint or suit. One important thing we have learned is that patients want an explanation of their care, and when they don't get it, they frequently feel they were not treated appropriately.
6. If a patient persists in a suit over care that we think was medically appropriate, or declines to participate in a dialogue with us, we will vigorously defend our staff with the finest legal team we can assemble.
7. No matter what happens: We will seek to learn from the experience, educate our staff, and make changes to the systems and processes that were involved in the care that prompted the complaint. Even if our analysis convinces us that we provided medically appropriate care, the patient's complaint teaches us that something has clouded his or her perception of our care. If we can do something to keep that from happening with another patient, we will.

Our results so far:

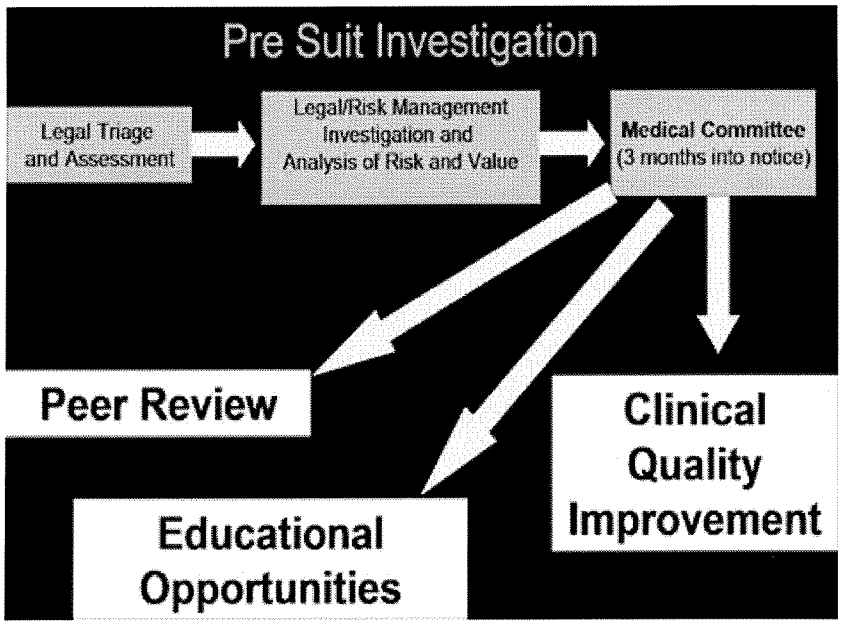
We have always worked to be open and provide full explanations to our patients. But since the year 2001, we've made significant changes and implemented a whole new process. Here's what the old process looked like:



The picture is much different today. Over the past few years, we've been using a system that looks more like this:



One of the major features of this system is the investigation that we perform once we receive a pre-lawsuit notice, or other communication from a patient indicating that he or she has retained legal counsel and intends to file suit. We also use this approach when a major error or near-miss occurs and is reported to our Risk Management office. The process looks something like this:



This investigative step is crucial to the success of our approach. We've implemented many clinical improvements as a result of review of incidents, complaints and near-misses.

We've empowered our staff to speak up, to suggest changes, and to alert us to potential problems, including an easy-to-use secure online patient safety reporting form.

The number of claims and lawsuits has dropped dramatically. In July, 2001 we had more than 260 pre-suit claims and lawsuits pending, already an enviable number in our region. We currently just over 100.

Our legal costs appear to be down dramatically, with the average legal expense per case down by more than 50 percent since 1997. We went to court over seven cases between Aug. 2001 and Sept. 2002, using the principle of court as the last resort. If we had lost all of them, we estimate the verdicts would have cost us more than $8 million. If we had settled all seven at the lowest pre-trial settlement demands, it would have cost about $2.5 million. We won six, and in the seventh the verdict called for a penalty of $150,000, far less than the $550,000 settlement demanded before trial. Trying all seven cost us $320,000 in legal fees. So, if you combine the settlement and the legal fees we paid, and compare it with the cost of settling all seven, we saved $2 million just in the first year of using this approach. We are still tallying results from later years.

The severity of our claims is rising far less rapidly than the national average. Nationally, the predicted severity of malpractice suits is rising by more than 10 percent each year. We're also seeing an increase, but it's about 2.6 percent each year. The slope of our claim severity graph began to change for claims arising from care in 2000, coinciding with our claims management changes in 2001 and 2002.

Opening-to-closing times for claims are dramatically shorter, down to about 10 months from more than 20 months in 2001.

Our malpractice premiums are practically level, despite increases in our clinical business. Both in terms of total expense and premium paid per adjusted hospital discharge, this goes completely against state and national trends. Because we're self-insured, this is a true savings that helps us spend our Health System's resources where they are needed.

We have instituted many changes to our clinical care based on lessons learned from patient complaints.

In closing...
Do we think the medical malpractice system in Michigan, or in the United States, is perfect? Of course not.

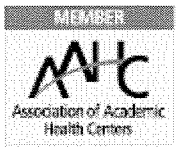
We see what our colleagues in other states without reforms are going through, and we hope that change will come in a form that will provide justice for both sides. We also hope that this country will work toward ensuring that litigation is

held as a last resort, and that courtroom evidence is soundly grounded in mainstream medicine and science.

But we also feel that, if there is to be any major reduction in medical malpractice claims and the financial impact they have on the medical community, there must first be an integrated approach to patient safety, quality improvement and the education of both medical staff and patients.

We hope our experience will be informative to others grappling with these same issues.

(Back to top)



SENATE BILL No. 990

February 12, 2004, Introduced by Senators BISHOP, PATTERSON and CROPSEY and referred to the Committee on Judiciary.

A bill to amend 1961 PA 236, entitled

"Revised judicature act of 1961,"

by amending section 5856 (MCL 600.5856), as amended by 1993 PA 78.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 5856. The statutes of limitations or repose are tolled **in any of the following circumstances:**

(a) At the time the complaint is filed, ~~and~~ **if** a copy of the summons and complaint are served on the defendant **within the time set forth in the court rules.**

(b) At the time jurisdiction over the defendant is otherwise acquired.

~~(c) At the time the complaint is filed and a copy of the summons and complaint in good faith are placed in the hands of an officer for immediate service, but in this case the statute is~~

SENATE BILL No. 990

~~not tolled longer than 90 days after the copy of the summons and complaint is received by the officer.~~

(c) ~~(d) If, during~~ **At the time notice is given in compliance with** the applicable notice period under section 2912b, **if during that period** a claim would be barred by the statute of limitations or repose; ~~, for~~ **but in this case, the statute is tolled** not longer than ~~a~~ **the** number of days equal to the number of days **remaining** in the applicable notice period after the date notice is given. ~~in compliance with section 2912b.~~

SENATE BILL No. 990

(As amended March 31, 2004)

February 12, 2004, Introduced by Senators BISHOP, PATTERSON and CROPSEY and referred to the Committee on Judiciary.

A bill to amend 1961 PA 236, entitled

"Revised judicature act of 1961,"

by amending section 5856 (MCL 600.5856), as amended by 1993 PA 78.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 5856. The statutes of limitations or repose are tolled **in any of the following circumstances:**

(a) At the time the complaint is filed, ~~and~~ **if** a copy of the summons and complaint are served on the defendant **within the time set forth in the** [supreme] **court rules.**

(b) At the time jurisdiction over the defendant is otherwise acquired.

~~(c) At the time the complaint is filed and a copy of the summons and complaint in good faith are placed in the hands of an officer for immediate service, but in this case the statute is~~

SENATE BILL No. 990

~~not tolled longer than 90 days after the copy of the summons and complaint is received by the officer.~~

(c) ~~(d) If, during~~ **At the time notice is given in compliance with** the applicable notice period under section 2912b, **if during that period** a claim would be barred by the statute of limitations or repose; ~~, for~~ **but in this case, the statute is tolled** not longer than ~~a~~ **the** number of days equal to the number of days **remaining** in the applicable notice period after the date notice is given. ~~in compliance with section 2912b.~~

[Enacting section 1. (1) Except as provided in subsection (2), this amendatory act applies to civil actions filed on or after the effective date of this amendatory act.

(2) This amendatory act does not apply to a cause of action if the statute of limitations or repose for that cause of action has expired before the effective date of this amendatory act.]

No. 28
STATE OF MICHIGAN
Journal of the Senate
92nd Legislature
REGULAR SESSION OF 2004

Senate Chamber, Lansing, Wednesday, March 17, 2004.

10:00 a.m.

The Senate was called to order by the President, Lieutenant Governor John D. Cherry, Jr.

The roll was called by the Secretary of the Senate, who announced that a quorum was present.

Allen—present
Barcia—present
Basham—present
Bernero—present
Birkholz—present
Bishop—present
Brater—present
Brown—present
Cassis—present
Cherry—present
Clark-Coleman—present
Clarke—present
Cropsey—excused
Emerson—present
Garcia—present
George—present
Gilbert—present
Goschka—present
Hammerstrom—present
Hardiman—present
Jacobs—present
Jelinek—present
Johnson—present
Kuipers—present
Leland—present
McManus—present
Olshove—present
Patterson—present
Prusi—present
Sanborn—present
Schauer—present
Scott—present
Sikkema—present
Stamas—present
Switalski—present
Thomas—present
Toy—present
Van Woerkom—present

E

Bernero
Birkholz
Bishop
Brater
Brown
Cassis
Cherry
Garcia
George
Gilbert
Goschka
Hammerstrom
Hardiman
Kuipers
Leland
McManus
Olshove
Patterson
Prusi
Sikkema
Stamas
Switalski
Thomas
Toy
Van Woerkom

Nays—0

Excused—1

Cropsey

Not Voting—0

In The Chair: President

The Senate agreed to the title of the bill.

The following bill was read a third time:

Senate Bill No. 990, entitled

A bill to amend 1961 PA 236, entitled "Revised judicature act of 1961," by amending section 5856 (MCL 600.5856), as amended by 1993 PA 78.

The question being on the passage of the bill,

The bill was passed, a majority of the members serving voting therefor, as follows:

Roll Call No. 136 **Yeas—37**

Allen
Barcia
Basham
Bernero
Birkholz
Bishop
Brater
Brown
Cassis
Cherry
Clark-Coleman
Clarke
Emerson
Garcia
George
Gilbert
Goschka
Hammerstrom
Hardiman
Jacobs
Jelinek
Johnson
Kuipers
Leland
McManus
Olshove
Patterson
Prusi
Sanborn
Schauer
Scott
Sikkema
Stamas
Switalski
Thomas
Toy
Van Woerkom

Nays—0

Excused—1

Cropsey

No. 25
STATE OF MICHIGAN
JOURNAL
OF THE
House of Representatives
92nd Legislature
REGULAR SESSION OF 2004

House Chamber, Lansing, Tuesday, March 23, 2004.

1:00 p.m.

The House was called to order by the Speaker Pro Tempore.

The roll was called by the Clerk of the House of Representatives, who announced that a quorum was present.

Accavitti—present
Acciavatti—present
Adamini—present
Amos—present
Anderson—present
Bieda—present
Bisbee—present
Bradstreet—present
Brandenburg—present
Brown—present
Byrum—present
Casperson—present
Caswell—present
Caul—present
Cheeks—present
Clack—present
Condino—present
Daniels—present
Dennis—present
DeRoche—present
DeRossett—present
Drolet—present
Ehardt—present
Elkins—present
Emmons—present
Farhat—present
Farrah—present
Gaffney—present
Garfield—present
Gieleghem—present
Gillard—present
Gleason—present
Hager—present
Hardman—present
Hart—present
Hood—present
Hoogendyk—present
Hopgood—present
Howell—present
Huizenga—present
Hummel—present
Hune—present
Hunter—present
Jamnick—present
Johnson, Rick—present
Johnson, Ruth—present
Julian—present
Koetje—present
Kolb—present
Kooiman—present
LaJoy—present
LaSata—present
Law—present
Lipsey—present
McConico—present
Meisner—present
Meyer—present
Middaugh—present
Milosch—present
Minore—present
Moolenaar—present
Mortimer—excused
Murphy—present
Newell—present
Nitz—present
Nofs—present
O'Neil—present
Palmer—present
Palsrok—present
Pappageorge—present
Pastor—present
Phillips—present
Plakas—present
Pumford—present
Reeves—present
Richardville—present
Rivet—present
Robertson—present
Rocca—present
Sak—present
Shackleton—present
Shaffer—present
Sheen—present
Sheltrown—present
Shulman—present
Smith—present
Spade—present
Stahl—present
Stakoe—present
Stallworth—present
Steil—present
Stewart—present
Tabor—excused
Taub—present
Tobocman—present
Vagnozzi—present
Van Regenmorter—present
Vander Veen—present
Voorhees—present
Walker—present
Ward—present
Waters—present
Wenke—present
Whitmer—present
Williams—present
Wojno—present
Woodward—present
Woronchak—present
Zelenko—present

e/d/s = entered during session

Ehardt	Kolb	Richardville	Williams
Elkins	Kooiman	Rivet	Wojno
Emmons	LaJoy	Robertson	Woodward
Farhat	LaSata	Rocca	Woronchak
Farrah	Law	Sak	Zelenko

Nays—0

In The Chair: Julian

The question being on agreeing to the title of the bill,

Rep. Richardville moved to amend the title to read as follows:

A bill to amend 1943 PA 240, entitled "State employees' retirement act," by amending sections 17g, 23, 27, 33, and 67a (MCL 38.17g, 38.23, 38.27, 38.33, and 38.67a), sections 17g, 23, and 27 as amended by 1987 PA 241, section 33 as amended by 2002 PA 93, and section 67a as added by 1996 PA 487, and by adding section 27a.

The motion prevailed.

The House agreed to the title as amended.

Rep. Richardville moved that the bill be given immediate effect.

The motion prevailed, 2/3 of the members serving voting therefor.

By unanimous consent the House returned to the order of

Motions and Resolutions

Rep. Richardville moved that Rule 45(c) be suspended.

The motion prevailed, 3/5 of the members present voting therefor.

Rep. Rick Johnson moved that the Committee on Commerce be discharged from further consideration of **House Bill No. 5632**.

(For first notice see House Journal No. 24, p. 461.)

The question being on the motion made by Rep. Rick Johnson,

Rep. Rick Johnson moved that consideration of the motion be postponed for the day.

The motion prevailed.

Rep. Richardville moved that House Committees be given leave to meet during the balance of today's session.

The motion prevailed.

Reports of Standing Committees

The Committee on Judiciary, by Rep. Howell, Chair, Chair, reported

Senate Bill No. 990, entitled

A bill to amend 1961 PA 236, entitled "Revised judicature act of 1961," by amending section 5856 (MCL 600.5856), as amended by 1993 PA 78.

With the recommendation that the following amendment be adopted and that the bill then pass.

1. Amend page 1, line 5, after "**the**" by inserting "**supreme**".

The bill and amendment were referred to the order of Second Reading of Bills and laid over one day under the rules.

Favorable Roll Call

To Report Out:

Yeas: Reps. Howell, LaSata, Van Regenmorter, Bradstreet, Koetje, Voorhees, Gaffney, Garfield, Lipsey, Adamini, Bieda, Condino and Smith

Nays: None

No. 29
STATE OF MICHIGAN
JOURNAL
OF THE
House of Representatives
92nd Legislature
REGULAR SESSION OF 2004

House Chamber, Lansing, Wednesday, March 31, 2004.

1:00 p.m.

The House was called to order by the Speaker Pro Tempore.

The roll was called by the Clerk of the House of Representatives, who announced that a quorum was present.

Accavitti—present
Acciavatti—present
Adamini—present
Amos—present
Anderson—present
Bieda—present
Bisbee—present
Bradstreet—present
Brandenburg—present
Brown—present
Byrum—present
Casperson—present
Caswell—present
Caul—present
Cheeks—present
Clack—present
Condino—present
Daniels—present
Dennis—present
DeRoche—present
DeRossett—present
Drolet—present
Ehardt—present
Elkins—present
Emmons—present
Farhat—present
Farrah—present
Gaffney—present
Garfield—present
Gieleghem—present
Gillard—present
Gleason—present
Hager—present
Hardman—present
Hart—present
Hood—present
Hoogendyk—present
Hopgood—present
Howell—present
Huizenga—present
Hummel—present
Hune—present
Hunter—present
Jamnick—present
Johnson, Rick—present
Johnson, Ruth—present
Julian—present
Koetje—present
Kolb—present
Kooiman—present
LaJoy—present
LaSata—present
Law—present
Lipsey—present
McConico—present
Meisner—present
Meyer—present
Middaugh—present
Milosch—present
Minore—present
Moolenaar—present
Mortimer—present
Murphy—present
Newell—present
Nitz—present
Nofs—present
O'Neil—present
Palmer—present
Palsrok—present
Pappageorge—present
Pastor—present
Phillips—present
Plakas—present
Pumford—present
Reeves—present
Richardville—present
Rivet—present
Robertson—present
Rocca—present
Sak—present
Shackleton—present
Shaffer—present
Sheen—present
Sheltrown—present
Shulman—present
Smith—excused
Spade—present
Stahl—present
Stakoe—present
Stallworth—present
Steil—present
Stewart—present
Tabor—present
Taub—present
Tobocman—present
Vagnozzi—present
Van Regenmorter—present
Vander Veen—present
Voorhees—present
Walker—present
Ward—present
Waters—present
Wenke—present
Whitmer—present
Williams—present
Wojno—present
Woodward—present
Woronchak—present
Zelenko—excused

e/d/s = entered during session

Roll Call No. 212

Yeas—105

Accavitti
Acciavatti
Adamini
Amos
Anderson
Bieda
Bisbee
Bradstreet
Brandenburg
Brown
Byrum
Casperson
Caswell
Caul
Cheeks
Clack
Condino
Daniels
Dennis
DeRoche
DeRossett
Drolet
Ehardt
Elkins
Emmons
Farhat
Farrah
Gaffney
Gieleghem
Gillard
Gleason
Hager
Hardman
Hart
Hood
Hoogendyk
Hopgood
Howell
Huizenga
Hummel
Hune
Hunter
Jamnick
Johnson, Rick
Johnson, Ruth
Julian
Koetje
Kolb
Kooiman
LaJoy
LaSata
Law
Lipsey
McConico
Meisner
Meyer
Middaugh
Milosch
Minore
Moolenaar
Mortimer
Newell
Nitz
Nofs
O'Neil
Palmer
Palsrok
Pappageorge
Pastor
Phillips
Plakas
Pumford
Reeves
Richardville
Rivet
Robertson
Rocca
Sak
Shackleton
Shaffer
Sheen
Sheltrown
Shulman
Spade
Stahl
Stakoe
Stallworth
Steil
Stewart
Tabor
Taub
Tobocman
Vagnozzi
Van Regenmorter
Vander Veen
Voorhees
Walker
Ward
Waters
Wenke
Whitmer
Williams
Wojno
Woodward
Woronchak

Nays—1

Garfield

In The Chair: Julian

Pursuant to Joint Rule 20, the full title of the act shall be inserted to read as follows:

"An act to protect from public disclosure certain information obtained in research and related activities of public universities and colleges; and to prescribe certain duties of public universities and colleges,"

The House agreed to the full title.

Rep. Richardville moved that the bill be given immediate effect.

The motion prevailed, 2/3 of the members serving voting therefor.

Second Reading of Bills

Senate Bill No. 990, entitled

A bill to amend 1961 PA 236, entitled "Revised judicature act of 1961," by amending section 5856 (MCL 600.5856), as amended by 1993 PA 78.

Was read a second time, and the question being on the adoption of the proposed amendment previously recommended by the Committee on Judiciary (for amendment, see House Journal No. 25, p. 473),

The amendment was adopted, a majority of the members serving voting therefor.

Rep. Howell moved to amend the bill as follows:

1. Amend page 2, following line 9, by inserting:

"Enacting section 1. (1) Except as provided in subsection (2), this amendatory act applies to civil actions filed on or after the effective date of this amendatory act.

(2) This amendatory act does not apply to a cause of action if the statute of limitations or repose for that cause of action has expired before the effective date of this amendatory act.".

The motion prevailed and the amendment was adopted, a majority of the members serving voting therefor.

Rep. Richardville moved that the bill be placed on the order of Third Reading of Bills.

The motion prevailed.

Rep. Richardville moved that the bill be placed on its immediate passage.

The motion prevailed, a majority of the members serving voting therefor.

Rep. Waters moved that Rep. O'Neil be excused temporarily from today's session.

The motion prevailed.

By unanimous consent the House returned to the order of

Third Reading of Bills

Senate Bill No. 990, entitled

A bill to amend 1961 PA 236, entitled "Revised judicature act of 1961," by amending section 5856 (MCL 600.5856), as amended by 1993 PA 78.

Was read a third time and passed, a majority of the members serving voting therefor, by yeas and nays, as follows:

Roll Call No. 213 **Yeas—105**

Accavitti
Acciavatti
Adamini
Amos
Anderson
Bieda
Bisbee
Bradstreet
Brandenburg
Brown
Byrum
Casperson
Caswell
Caul
Cheeks
Clack
Condino
Daniels
Dennis
DeRoche
DeRossett
Drolet
Ehardt
Elkins
Emmons
Farhat
Farrah
Gaffney
Garfield
Gieleghem
Gillard
Gleason
Hager
Hardman
Hart
Hood
Hoogendyk
Hopgood
Howell
Huizenga
Hummel
Hune
Hunter
Jamnick
Johnson, Rick
Johnson, Ruth
Julian
Koetje
Kolb
Kooiman
LaJoy
LaSata
Law
Lipsey
McConico
Meisner
Meyer
Middaugh
Milosch
Minore
Moolenaar
Mortimer
Newell
Nitz
Nofs
Palmer
Palsrok
Pappageorge
Pastor
Phillips
Plakas
Pumford
Reeves
Richardville
Rivet
Robertson
Rocca
Sak
Shackleton
Shaffer
Sheen
Sheltrown
Shulman
Spade
Stahl
Stakoe
Stallworth
Steil
Stewart
Tabor
Taub
Tobocman
Vagnozzi
Van Regenmorter
Vander Veen
Voorhees
Walker
Ward
Waters
Wenke
Whitmer
Williams
Wojno
Woodward
Woronchak

Nays—0

In The Chair: Julian

Pursuant to Joint Rule 20, the full title of the act shall be inserted to read as follows:

"An act to revise and consolidate the statutes relating to the organization and jurisdiction of the courts of this state; the powers and duties of such courts, and of the judges and other officers thereof; the forms and attributes of civil claims and actions; the time within which civil actions and proceedings may be brought in said courts; pleading, evidence, practice and procedure in civil and criminal actions and proceedings in said courts; to provide remedies and penalties for the violation of certain provisions of this act; to repeal all acts and parts of acts inconsistent with or contravening any of the provisions of this act; and to repeal acts and parts of acts,"

The House agreed to the full title.

Rep. Richardville moved that the bill be given immediate effect.

The motion prevailed, 2/3 of the members serving voting therefor.

Second Reading of Bills

Senate Bill No. 744, entitled

A bill to amend 1994 PA 451, entitled "Natural resources and environmental protection act," by amending section 2505 (MCL 324.2505), as added by 1995 PA 60, and by adding section 2505a.

Was read a second time, and the question being on the adoption of the proposed substitute (H-2) previously recommended by the Committee on Land Use and Environment,

The substitute (H-2) was adopted, a majority of the members serving voting therefor.

Rep. Richardville moved that the bill be placed on the order of Third Reading of Bills.

The motion prevailed.

Rep. Richardville moved that the bill be placed on its immediate passage.

The motion prevailed, a majority of the members serving voting therefor.

Rep. Waters moved that Rep. Daniels be excused temporarily from today's session.

The motion prevailed.

By unanimous consent the House returned to the order of

Third Reading of Bills

Senate Bill No. 744, entitled

A bill to amend 1994 PA 451, entitled "Natural resources and environmental protection act," by amending section 2505 (MCL 324.2505), as added by 1995 PA 60, and by adding section 2505a.

The bill was read a third time.

The question being on the passage of the bill,

Rep. Richardville moved that consideration of the bill be postponed for the day.

The motion prevailed.

Second Reading of Bills

House Joint Resolution T, entitled

A joint resolution proposing an amendment to the state constitution of 1963, by amending section 7 of article IX, to limit the rate of the state income tax.

The joint resolution was read a second time.

Rep. Drolet moved that the joint resolution be placed on the order of Third Reading of Bills.

The motion prevailed.

Rep. Richardville moved that the joint resolution be placed on its immediate passage.

The motion prevailed, a majority of the members serving voting therefor.

No. 35
STATE OF MICHIGAN
Journal of the Senate
92nd Legislature
REGULAR SESSION OF 2004

Senate Chamber, Lansing, Thursday, April 1, 2004.

10:00 a.m.

The Senate was called to order by the President, Lieutenant Governor John D. Cherry, Jr.

The roll was called by the Assistant Secretary of the Senate, who announced that a quorum was not present.

Allen—present
Barcia—present
Basham—present
Bernero—present
Birkholz—present
Bishop—present
Brater—present
Brown—present
Cassis—present
Cherry—present
Clark-Coleman—present
Clarke—present
Cropsey—present
Emerson—present
Garcia—present
George—present
Gilbert—present
Goschka—present
Hammerstrom—present
Hardiman—present
Jacobs—present
Jelinek—present
Johnson—present
Kuipers—present
Leland—present
McManus—present
Olshove—present
Patterson—present
Prusi—present
Sanborn—present
Schauer—present
Scott—present
Sikkema—present
Stamas—present
Switalski—present
Thomas—present
Toy—present
Van Woerkom—present

The Senate agreed to the full title.
The bill was referred to the Secretary for enrollment printing and presentation to the Governor.

Senate Bill No. 990, entitled
A bill to amend 1961 PA 236, entitled "Revised judicature act of 1961," by amending section 5856 (MCL 600.5856), as amended by 1993 PA 78.
The House of Representatives has amended the bill as follows:
1. Amend page 1, line 5, after "**the**" by inserting "**supreme**".
2. Amend page 2, following line 9, by inserting:
"Enacting section 1. (1) Except as provided in subsection (2), this amendatory act applies to civil actions filed on or after the effective date of this amendatory act.
(2) This amendatory act does not apply to a cause of action if the statute of limitations or repose for that cause of action has expired before the effective date of this amendatory act.".
The House of Representatives has passed the bill as amended, ordered that it be given immediate effect and pursuant to Joint Rule 20, inserted the full title.
Pending the order that, under rule 3.202, the bill be laid over one day,
Senator Hammerstrom moved that the rule be suspended.
The motion prevailed, a majority of the members serving voting therefor.
The question being on concurring in the amendments made to the bill by the House,
The amendments were concurred in, a majority of the members serving voting therefor, as follows:

Roll Call No. 211 **Yeas—38**

Allen	Clark-Coleman	Jacobs	Sanborn
Barcia	Clarke	Jelinek	Schauer
Basham	Cropsey	Johnson	Scott
Bernero	Emerson	Kuipers	Sikkema
Birkholz	Garcia	Leland	Stamas
Bishop	George	McManus	Switalski
Brater	Gilbert	Olshove	Thomas
Brown	Goschka	Patterson	Toy
Cassis	Hammerstrom	Prusi	Van Woerkom
Cherry	Hardiman		

Nays—0

Excused—0

Not Voting—0

In The Chair: President

The question being on concurring in the committee recommendation to give the bill immediate effect,
The recommendation was concurred in, 2/3 of the members serving voting therefor.
The Senate agreed to the full title.
The bill was referred to the Secretary for enrollment printing and presentation to the Governor.

Senate Bill No. 1032, entitled
A bill to amend 1994 PA 55, entitled "Confidential research information act," by amending the title and sections 1 and 2 (MCL 390.1551 and 390.1552) and by adding section 4a.
The House of Representatives has passed the bill, ordered that it be given immediate effect and pursuant to Joint Rule 20, inserted the full title.
The question being on concurring in the committee recommendation to give the bill immediate effect,
The recommendation was concurred in, 2/3 of the members serving voting therefor.

Legislative Analysis

HOUSE FISCAL AGENCY

Mitchell Bean, Director
Phone: (517) 373-8080
http://www.house.mi.gov/hfa

STATUTE OF LIMITATIONS: SERVICE

Senate Bill 990 with House committee amendment
Sponsor: Sen. Michael D. Bishop
House Committee: Judiciary
Senate Committee: Judiciary

First Analysis (3-24-04)

BRIEF SUMMARY: The bill would clarify that the statutes of limitations would be tolled at the time a complaint is filed with a court if a copy of the summons and complaint were served on the defendant within the time frame established by Michigan Supreme Court rules.

FISCAL IMPACT: The bill would have no fiscal impact on state or local government.

THE APPARENT PROBLEM:

A statute of limitations for a civil action establishes a time frame during which one party can bring a lawsuit against another to recover damages. Once that time period expires, the injured party cannot sue the other party. Under current law, an action is commenced when the complaint is filed with a court. A copy of the complaint and the summons is required to be delivered to the defendant in a timely manner. Under state supreme court rules, a summons expires 91 days after issue. If the defendant cannot be served before the summons expires, but the plaintiff showed due diligence in attempting to serve the original summons, a judge may order a second summons to be issued. This second summons may be issued for up to one year. When a summons expires, the action is considered dismissed as to a defendant who has not been served with the complaint, although the plaintiff may file a new action against the defendant as long as the statute of limitations for the action has not yet run out.

In addition, MCL 600.5856 allows the statute of limitations to be tolled (suspended) under four circumstances: 1) at the time the complaint is filed and a copy of the summons and complaint are served on the defendant; 2) at the time jurisdiction over the defendant is otherwise acquired; 3) at the time the complaint is filed and a copy of the summons and complaint in good faith are placed in the hands of an officer for immediate service – except the statute of limitations cannot be tolled more than 90 days after the officer receives the summons and complaint; and 4) for a specified time period under certain circumstances pertaining to medical malpractice actions.

However, for over 30 years, this provision of law regarding the tolling of the statutes of limitations was interpreted as applying very narrowly to prior lawsuits between parties in which the merits of the action had not been adjudicated. [*Buscaino* v *Rhodes*, 385 Mich 474 (1971)] In other words, for over three decades the statutes of limitations were

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considered tolled when the complaint was filed regardless of how long it took to serve the defendant with the summons and complaint – as long as service was done during the life span of the summons.

A recent court case changed this. In *Gladych* v *New Family Homes, Inc.*, 468 Mich 594 (July 2003), the complaint was filed on January 22, 1999 - one day before the three-year limitations period expired. The plaintiff was unsuccessful in serving the defendant with the summons and complaint before the summons expired, but was granted a second summons and successfully served the defendant on May 4, 1999. The Michigan Supreme Court overruled *Buscaino* and held that the plaintiff failed to comply with the statute of limitations requirements because even though the complaint was filed with the court within the three-year statute of limitations (SOL) period, the summons and complaint were not served according to any of the four ways to stop the clock, so to speak, under MCL 600.5856. Therefore, according to the *Gladych* court, the SOL clock had run out before the summons and complaint was served on the defendant; thus, the lawsuit was dismissed.

Since *Gladych* threw the proverbial monkey wrench into the accustomed manner of tracking the SOL by legal professionals, some feel that the statute regarding tolling the statutes of limitations should be clarified. Legislation has been introduced to address this concern.

THE CONTENT OF THE BILL:

The bill would amend the Revised Judicature Act to revise a provision that tolls (or suspends) the statute of limitations at the time a complaint is filed and a copy of the summons and complaint are served on the defendant. Under the bill, the statute of limitations would be tolled only if the summons and complaint were served on the defendant within the time set forth in the supreme court rules.

The bill also would delete a provision that tolls the statute of limitations at the time the complaint is filed and a copy of the summons and complaint in good faith are placed in the hands of an officer for immediate service, for up to 90 days after the officer receives the summons and complaint.

MCL 600.5856

ARGUMENTS:

For:

The bill would revise the law pertaining to tolling the statutes of limitations for civil actions, and restore the common practice used for over 30 years. The clarification would also resolve several existing conflicts between statutes and state supreme court rules. For instance, one statute states that an action commences when the complaint is filed, leading many to believe that filing the complaint is what tolls the statutes of limitations; yet, another provision states that the statutes of limitations are tolled by a combination of

filing the complaint in court and service of process on the defendant of the summons and complaint. In one provision, the summons is good for 90 days, but is good for 91 days according to court rules. Under the bill, it would be clear that filing the complaint would stop the SOL clock, as long as the summons and complaint were served on the defendant within the time period established in the supreme court rules (currently 91 days). The bill would still allow the SOL to be tolled at the time jurisdiction over the defendant was acquired by other means and would clarify the circumstance tolling the SOL in medical malpractice cases.

Further, it is reported that most service of process is no longer provided by "officers" (sheriffs and their deputies); therefore, the provision tolling the statutes of limitations by placing the summons and complaint in the hands of an officer would be eliminated.

Response:

The bill should be amended to clarify which actions it would pertain to. For instance, would it apply to all cases filed after the bill's effective date, or only to those cases arising after the effective date?

POSITIONS:

The Michigan Trial Lawyers Association supports the bill. (3-23-04)

Legislative Analyst: S. Stutzky
Fiscal Analyst: Marilyn Peterson

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

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BILL ANALYSIS

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Senate Bill 990 (as enrolled)
Sponsor: Senator Michael D. Bishop
Senate Committee: Judiciary
House Committee: Judiciary

PUBLIC ACT 87 of 2004

Date Completed: 2-25-05

RATIONALE

Under the Revised Judicature Act, a civil lawsuit must be brought within a certain period of time after the events giving rise to the action occurred (that is, after the cause of action arose) If a suit is not brought within the prescribed "statute of limitations" (or "statute of repose"), it is subject to dismissal by the court. Section 5856 of the Act specifies circumstances under which the statute of limitations is tolled, or suspended; that is, if one of the conditions applies, the clock will stop running. This section was the subject of a July 2003 Michigan Supreme Court decision (*Gladych* v *New Family Homes, Inc.*, 468 Mich 594), which overruled a 1971 decision of the Court interpreting the same language (*Buscaino* v *Rhodes*, 385 Mich 474). (The decisions are described in **BACKGROUND**, below.) In particular, the Courts addressed provisions tolling the statute of limitations when a complaint is filed and the defendant is served with a copy of the summons and complaint. Although the earlier ruling construed the statute in a way that did not strictly conform to its language, this decision--combined with a court rule setting a time limit on the service of a summons--resolved practical controversies over the tolling of the statute of limitations. When the Court reversed *Buscaino* in 2003, however, it became apparent that the disputes that led to the 1971 decision would arise again. It was suggested that a statutory amendment was needed to settle the matter.

CONTENT

The bill amended Section 5856 of the Revised Judicature Act to provide that the statute of limitations is tolled at the time the complaint is filed if a copy of the summons and complaint is served on the defendant within the time set forth in the Supreme Court rules. Previously, the Act provided that the statute of limitations was tolled when the complaint was filed and a copy of the summons and complaint was served on the defendant.

The bill also deleted a provision that tolled the statute of limitations for up to 90 days when a complaint was filed and a copy of the summons and complaint was placed in the hands of an officer for immediate service.

The bill does not apply to a cause of action if the statute of limitation or repose for that cause of action expired before the bill's effective date. Otherwise, the bill applies to actions filed on or after its effective date. The bill took effect on April 22, 2004.

(The Act also provides that the statute of limitations is tolled at the time jurisdiction is otherwise acquired over the defendant; and at the time notice is given in compliance with the applicable notice period under MCL 600.2912b (which applies to medical malpractice actions), if during that period a claim would be barred by the statute of limitations. The bill did not amend these provisions.)

MCL 600.5856

BACKGROUND

In *Buscaino* v *Rhodes*, the Michigan Supreme Court in 1971 addressed a

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situation in which, six days before the statute of limitations expired, the plaintiffs filed a complaint and placed a copy of the summons and complaint in the hands of a deputy sheriff for service. The sheriff was told not to serve the defendants until one of them returned to the State, which occurred approximately two months later. Although the trial court and the Court of Appeals held that the statute of limitations had *not* been tolled, the Supreme Court reversed those decisions. The Supreme Court found that Section 5856 conflicted with a court rule stating that an action is commenced by the filing of a complaint. (The rule at the time was GCR 101. The language presently is found in MCR 2.101(B).) According to the Court, once an action was commenced within the statutory period of limitations, the issue of "tolling" did not arise. "It is only when the action is not commenced within the statutory period—as determined by consulting the date of claim, the date of filing the complaint and a calendar...that tolling comes into play." The Court further found that Section 5856 had replaced an earlier statute that dealt only with prior lawsuits between the parties in which the merits of the action had not been adjudicated.

According to the Court, statutes of limitations were considered to be procedural, rather than substantive. Since the Supreme Court has the constitutional power to make procedure in all courts of the State, the *Buscaino* Court held that the court rule, rather than the statute, was controlling. Essentially, then, the Court decided that merely filing the complaint stopped the statute of limitations from running with respect to the action begun with the complaint, and Section 5856 applied to tolling the statute of limitations only with respect to a subsequent action if an initial action was dismissed.

In 2003, the Supreme Court in *Gladych* v *New Family Homes, Inc.* stated that the interpretation of Section 5856 in *Buscaino* "...is contrary to the plain language of the statute and should be repudiated". The Court examined both Section 5856 and Section 5805(1) of the Revised Judicature Act. Section 5805(1) provides, "A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff..., the action is commenced within the periods of time prescribed by this section." According to the Court, if the mere filing of a complaint under Section 5805(1) made the statute of limitations irrelevant, the provisions of Section 5856 that effectuate the tolling would be unnecessary. "Applying § 5856 to all claims as required by the statutory language gives full effect to both the threshold requirement of § 5805 and the tolling requirements of § 5856."

According to the Court, "if one of the four enumerated actions [in § 5856] does not occur, the statutes of limitations or repose are *not* tolled. Nothing in the statutory language permits limiting § 5856 to actions in which a prior suit was not adjudicated on the merits."

Regarding the conflict between the court rule and the statute, the Court stated that it had "...since clarified the distinction between statutes regarding matters of 'practice and procedure' and those regarding substantive law...If the statute concerns a matter that is purely procedural and pertains only to the administration of the courts, the court rule would control." The Court held that statutes regarding periods of limitations are substantive in nature. "Therefore,...it is clear that, to the extent § 5856 enacts additional requirements regarding the tolling of the statute of limitations, the statute would supercede the court rule."

The Court concluded, "We hold that the unambiguous language of §§ 5805 and 5856 provides that the filing of a complaint alone does not toll the running of the limitations period. In addition to filing the complaint, one must also comply with the requirements of § 5856 in order to toll the limitations period." The Court gave its decision limited retroactive effect, applying it only to those cases in which this specific issue had been raised and preserved. In all other cases, the decision was given prospective application, effective September 1, 2003.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The Supreme Court's decision in *Gladych* changed the way the statutes of limitations were applied in this State for 30 years.

Evidently, after Section 5856 originally was enacted, there was considerable litigation over whether a defendant actually had been "served" with a complaint before the statute of limitations had run, whether a complaint had been placed in the hands of an officer for immediate service, and how the 90-day tolling period was to be calculated. By holding that merely filing a complaint stopped the statute of limitations from running, the *Buscaino* Court provided a simple method for determining whether the statute of limitations barred a claim.

Although the 1971 decision left open the possibility for a defendant to be served long after the complaint was filed, court rules promulgated by the Supreme Court require a complaint to be served within a fixed period of time after it is filed. Specifically, under MCR 2.102(D), a summons expires 91 days after the complaint is filed, although the judge may order a second summons to be issued for a definite time not exceeding one year after the complaint is filed. Therefore, plaintiffs knew that if they filed a complaint before the period of limitations expired, the action would not be dismissed as long as the defendant was served within 91 days.

By overruling *Buscaino*, however, the Supreme Court reopened the door to disputes and litigation over when the statute of limitations is tolled. Senate Bill 990 essentially restored the rules that applied before the 2003 decision, by making it clear that a defendant must be served within the time prescribed by court rule.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bill will have no fiscal impact on State or local government.

Fiscal Analyst: Bethany Wicksall

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